

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Wallace N. Davis, Executive Director
Department of Air Pollution Control
9th Street Office Building
P.O. 10089
Richmond, Virginia 23240

January 21, 1993

Dear Mr. Davis:

This letter provides a response to the specific inquiry made as to whether standing to petition in State court for judicial review of a final Title V operating permit could be limited to persons who participated in the public comment process by actually appearing and testifying at the relevant public hearing held on the proposed version of the permit. Limiting standing to such persons would not satisfy Title V, section 502 (b)(6) of the Clean Air Act (CAA), the accompanying federal regulations promulgated at 40 CFR 70.4, or Article III of the United States Constitution.

Enclosed is a copy of a letter sent by John R. Barker, Regional Counsel of EPA's Region IV Office in Atlanta, Georgia to Daniel F. McLawhorn, Esquire, Special Deputy Attorney General of the State of North Carolina on the subject of the minimum required standing provisions in state Title V operating permitting regulations. In particular we call your attention to the decisions rendered in relevant case law, cited in the enclosure, on the issue of judicial interpretation of the requirements of Article III of the federal Constitution on who is to be afforded standing. This enclosed letter has been reviewed and concurred with by EPA's Office of General Counsel in Washington, D.C.

From decisions rendered in the cited case law which EPA believes to be relevant, limiting standing to those persons who participated in the public comment process by actually appearing and testifying at the public hearing held on a permit would not satisfy federal requirements for approval of the Commonwealth's operating permit program required by Title V of the CAA, as tempered by Article III of the Constitution.

EPA interprets Section 502(b)(6) to require a state to provide access to judicial review to any commenter who meets Article III's threshold standing requirements.

As you know, the Commonwealth is required to submit a fully adopted operating permit program to EPA by November 15, 1993 in accordance with Title V of the CAA and 40 CFR Part 70. Failure to do so would result in both the imposition of sanctions in the Commonwealth and the implementation of such a program by EPA, including the collection of associated fees.

Sincerely,

Thomas J. Maslany, Director
Air, Radiation & Toxics Division

enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 COURTLAND STREET. N.E.
ATLANTA, GEORGIA 30365
December 29, 1992

BY TELECOPIER

4RC

Daniel F. McLewhorn, Esquire
Special Deputy Attorney General
State of North Carolina
Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629

RE: Judicial Review Provision of 1990 Clean Air Act Amendments

Dear Mr. McLawhorn'

The purpose of this letter is to respond to your September 28, 1992 request for our interpretation of section 502(b)(6) of the Clean Air Act, as that provision relates to Judicial review of state permit decisions. You inquired whether EPA interprets this provision to require a state to provide an opportunity for judicial review to persons who comment on a permit application but who are not "injured" by the final agency action, within the meaning of the state's constitution. For the reasons set forth below, we read section 502(b)(6) to allow approval of a state or local operating permit program that restricts access to judicial review among participants in the public comment process, provided that those restrictions do not exceed the limits on judicial review imposed by the standing requirements of Article III of the United States Constitution.

An interpretation of a statute should begin with the plain meaning of the actual language of the statute. Mallard v. U.S. District Court, 490 U.S. 296, 300-01 (1989). Section 502(b)(6) of the Act requires, among other things, that approved operating permit programs provide "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law". 42 U.S.C. § 7661a (b)(6) (emphasis added). The operating permit regulations echo this requirement. Operating Permit Program: Final Rule, 57 Fed. Reg. 32250 (July 21, 1992), section 70.4 (b)(3)(x).

On Its face, the Act's requirement of access to judicial review appears absolute; citizens must have access to state courts regardless of whether they would have standing in an analogous

situation under Article III of the United States Constitution. We believe, however, that this is an unreasonable interpretation of the Act.

If EPA were to disapprove a state program for its failure to provide unlimited access to judicial review for commenters, EPA would be required to promulgate and administer a federal permit program under section 502(d)(3) of the Act. Under such a federally administered program, citizens would have access to judicial review only if they met the minimal standing requirements of Article III, See Lujan v; Defenders of Wildlife, ___U.S.___ , 112 S.Ct. 2130, (1992). Therefore, it would be anomalous and futile for Congress to have mandated EPA's disapproval of a state program which does not provide unlimited access to judicial review, when EPA itself would have to impose Article III's standing limitations. To avoid this anomaly, we believe that section 502(b)(6) must be read to require a state or local program to provide access to judicial review to any commenter who meets Article III's threshold standing requirements. Consequently, although Article III does not apply to state courts, we believe that the judicial review requirements of section 502(b)(6) are tempered by article III's standing requirements.

This interpretation is consistent with the legislative history of section 502(b)(6), with respect to the judicial review provision, at the time this language was added to the Act the Senate managers observed that:

Several other provisions [in section 502(b)(6)] are included to ensure fair treatment in the permit process. For example, we make clear that judicial review of final actions by the permitting authority to issue or deny permits shall be available in State court to anyone who could obtain such review under any applicable law. This provision ensures that existing provisions of law governing the availability of review of final actions on permit applications are in no way limited, and that interested parties who arguably are affected by permit decisions are guaranteed their day in court.

CHAFEE-BAUCUS STATEMENT OF SENATE MANAGERS, S. 1630, THE CLEAN AIR ACT AMENDMENTS OF 1990, reprinted in 136 Cong. Rec. S16,941 (daily ed. October 27, 1990) (emphasis added). This language evidences the intent of Congress to ensure access to State court to anyone participating in the public comment process, where such persons "arguably are affected by permit decisions." We believe the phrase "arguably are affected by permit decisions" is most reasonably interpreted as a reference to the standing

requirements which are a prerequisite to obtaining access to judicial review in the federal courts. It follows that, to the extent that a participant in the public comment process would satisfy the federal requirements of standing to appeal a final permit decision a state's operating permit program must afford that party access to the state judicial review process.

As interpreted by the U.S. Supreme Court, Article III's standing requirement contains three key elements:

[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"... and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Valley Forge Christian Church v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted). See also Lujan v. Defenders of Wildlife, ___U.S.___, 112 S.Ct. 2130, 2136 (1992).

The Supreme Court held in Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972), that harm to aesthetic, environmental, or recreational interests is sufficient to confer standing, provided that the party seeking review is among the injured. This holding was most recently reaffirmed by the Supreme Court in Lujan v. Defenders of Wildlife, 112 S.Ct. at 2137. Moreover, the Supreme court has held that a plaintiff's injury need not be large to satisfy the standing requirement, that an "identifiable trifle" will suffice. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 668, n. 14 (1973). This low threshold for sufficiency of injury has been applied in many subsequent decisions. See, e.g., Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109 (4th Cir. 1988), cert. denied. 491 U.S. 904 (1989) (injury to aesthetic and environmental interests is sufficient where pollution would effect a river along which a single group member hiked); Friends of the Earth v. Consolidated Rail Corp., 76B F.2d 57, 61 (2d Cir.1985) (two affidavits testifying to the recreational use of a river and finding pollution offensive to aesthetic values are sufficient to demonstrate injury).

Section 70.4(b)(3) of the operating permit regulations requires a state title V program submittal to be accompanied by a legal opinion demonstrating that the laws of the state, including, where appropriate, judicial decisions, provide adequate authority to carry out all aspects of the program, including those implementing section 70.4(b)(3)(x) of the regulations. The EPA

will evaluate state restrictions on access to judicial review on a program by program basis, guided by the standards established in case law under Article III of the United States Constitution. In addition, we note that EPA's approval of state and local operating permit programs will be predicated in part on whether a program provides for the "fair treatment" of permit applicants, public commenters, and other interested parties, as envisioned by Congress in enacting section 502(b)(6). A program that places restrictions on the public's ability to comment on a proposed permit decision would not be consonant with the purpose of this provision of the Act. Moreover, such restrictions on access to the public comment process would be a de facto limitation on the opportunity for judicial review beyond those contemplated in the Act, and would therefor directly contravene the mandate of section 502(b)(6).

This letter has been reviewed and concurred with by the EPA Office of General Counsel in Washington, D.C. Should you have any additional questions concerning this matter, you may contact Keith Holman, Assistant Regional Counsel, at (404) 347-2335 (extension 2129). I am also available to discuss this matter at your convenience.

Sincerely,

John R. Barker
Regional Counsel

cc: Alan Klimek
S. Allen Jernigan, Esquire